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In the Supreme Court of the United States

OCTOBER TERM, 1976

FREDERICK JOSEPH TURK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-38) is reported at 526 F. 2d 654.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1976. A petition for rehearing was denied on March 8, 1976 (Pet. App. 39). On April 9, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to May 7, 1976. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a telephone conversation is "intercepted" when a recording of it made by a private party is subsequently seized and played by law enforcement officials.

2. Whether petitioner could refuse to answer questions before the grand jury on the ground that the questioning derived from illegally seized evidence.

3. Whether the exclusionary rule may be invoked to suppress, at trial, illegally seized evidence needed to prove that petitioner committed perjury before the grand jury in response to questions based upon that evidence.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of perjury before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to one year's imprisonment and was fined $5,000. The court of appeals affirmed.

The evidence at trial showed that on July 13, 1973, Charles Kabbaby and Glenn Roblin, who were involved with petitioner in a marijuana smuggling scheme, were arrested while driving a car in Dade County, Florida. During an inventory search of the automobile[1] the officers discovered a quantity of cocaine, a rifle, electronic equipment and more than $30,000 in cash (Tr. 15-18, 71). They also found a cassette recorder and two tapes. Although Kabbaby told the officers that the tapes were blank, one officer elected to play them. One of the tapes contained an incriminating telephone conversation between Kabbaby and petitioner regarding the smuggling venture. Kabbaby had made the recording without petitioner's knowledge or permission (Tr. 19-28, 212).

Petitioner subsequently was subpoenaed to appear before a federal grand jury investigating possible violations of federal narcotics laws. He was granted use immunity pursuant to 18 U.S.C. 6002. He initially refused to testify on the ground that the questioning derived from

[1]See *South Dakota* v. *Opperman*, No. 75-76, decided July 6, 1976.

unlawful electronic surveillance (G. Tr. 3-7).[2] A hearing followed at which petitioner's claim in this regard was rejected; the court then instructed him to return to the grand jury and to answer the questions.[3] He did so; he unequivocally denied ever having engaged in buying, selling, or otherwise trafficking in marijuana (Tr. 566-567).

In fact, however, petitioner had been an active participant in a venture to smuggle 3,100 pounds of marijuana into the United States from Jamaica (Tr. 342-351, 420-454). The tape of petitioner's conversation with Kabbaby, which implicated him in that venture, was played before the grand jury and at petitioner's trial (Tr. 19-28, 212). The government also presented at trial the testimony of individuals who had worked closely with petitioner in the smuggling operation.

In ruling on petitioner's pretrial motion to suppress the recording, the district court held that the tape was legitimately seized pursuant to a routine inventory procedure, but that it was unnecessary and therefore improper for the police officers to have played the recording. The court concluded, however, that petitioner had no standing to complain about this procedure. It denied his motion to suppress (Tr. 88-89).

The court of appeals agreed with the district court's ruling that the police officers should not have listened to the tape recording (Pet. App. 28). The court held, however, that even if this action violated petitioner's rights under

[2]"G. Tr." refers to the transcript of petitioner's testimony before the grand jury on November 27, 1973.

[3]Although this hearing was not transcribed, we have been advised by the government attorney who presented evidence to the grand jury that petitioner was so instructed.

the Fourth Amendment,[4] the recording was nevertheless properly used both before the grand jury and as evidence at petitioner's perjury trial.

ARGUMENT

1. As the court below held (Pet. App. 9-13), there is no support for the view urged by petitioner (Pet. 14-16) that replaying a recording of a previously intercepted telephone conversation is another "interception" within the meaning of 18 U.S.C. 2510 *et seq.*[5]

An "interception" is defined by 18 U.S.C. 2510(4) as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." Thus, as the court of appeals wrote (Pet. App. 9; footnote omitted): "Kabbaby's action in recording his conversation with [petitioner] was clearly an interception under this definition. This interception was not violative of the Act, however, because § 2511(2)(d) specifically exempts situations in which one party to the conversation is himself the interceptor." Petitioner argues that each replaying of the recording is another "interception." The focus of the statute, however, is upon the "acquisition" of the communication. The court of appeals therefore correctly found (Pet. App. 10-11) that an "interception" occurs only when a recording is made contemporaneously with the communication.

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[4]Petitioner contends that the court of appeals held that he has standing to contest the seizure (Pet. 8, 12). But the majority of the panel found it unnecessary to reach the question of petitioner's standing to contest the validity of the seizure of the contents of the recording (Pet. App. 38). Only Judge Goldberg concluded that petitioner has standing (Pet. App. 13-27). See also note 7, *infra*.

[5]If it were an "interception," the use of the recording before the grand jury arguably would be inappropriate under 18 U.S.C. 2515 and *Gelbard* v. *United States*, 408 U.S. 41. We do not concede, however, that *Gelbard*, which dealt with a defense in contempt proceedings, also requires "suppression" of evidence.

This view is reinforced, if not compelled, by the distinction drawn between an interception and a disclosure. Compare 18 U.S.C. 2511(1)(c) with 18 U.S.C. 2517. A "disclosure" can occur any time a recording is played. Although the lawfulness of a disclosure depends almost entirely upon the lawfulness of the interception,[6] the statutory distinction between an "interception" and a "disclosure" supports the conclusion of the court of appeals that "no new and distinct interception occurs when the contents of a communication are revealed through the replaying of a previous recording" (Pet. App. 13). Thus, the only "interception" in this case occurred when Kabbaby recorded his conversation with petitioner, and that interception did not violate the statute.

2. Petitioner also argues that the questions before the grand jury were based upon evidence seized in violation of the Fourth Amendment,[7] and that they were unlawful

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[6]The lawfulness of a private individual's disclosure of an intercepted conversation to which he is a party depends entirely upon the lawfulness of the interception. 18 U.S.C. 2511(1)(c). Disclosure by an investigative or law enforcement officer must, in addition, be "appropriate to the proper performance of the official duties of the officer making or receiving the disclosure." 18 U.S.C. 2517(1).

[7]We accept *arguendo* petitioner's assertion that playing the tapes was an unconstitutional "seizure." But it is far from clear that he has standing to object. Judge Goldberg, in a portion of his opinion not joined by the two other judges of the panel (compare Pet. App. 13-27 with *id.* at 38), concluded that petitioner has standing because he was "aggrieved" by the introduction of the tape recording into evidence. We do not believe that this is sufficient to confer standing upon petitioner. Every defendant is "aggrieved," in Judge Goldgerg's sense, by each item of evidence introduced against him, but it does not follow that every defendant has standing to object to every search. He has standing only if the search or seizure itself violated his rights. *United States* v. *Miller*, No. 74-1179, decided April 21, 1976; *Brown* v. *United States*, 411 U.S. 223; *Alderman* v. *United States*, 394 U.S. 165. In this case the officers seized the tapes from Kabbaby's possession, violating none of petitioner's rights. And although the officers

because the questioning antedated *United States* v. *Calandra*, 414 U.S. 338. But there is no "retroactivity" problem here. *Calandra* rests upon settled principles governing both the conduct of grand jury proceedings and application of the exclusionary rule. It did not change the law; petitioner has not been taken by surprise.[8] He cites no pre-*Calandra* case of this Court or the Fifth Circuit disallowing questioning of the sort that took place here. In this very case the district court instructed petitioner to answer the grand jury's questions.

Moreover, even if it was improper to ask petitioner questions based upon information obtained in violation of his constitutional rights, it does not follow that petitioner was free to lie in response. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976, plurality slip op. 12, citing *Bryson* v. *United States*, 396 U.S. 64, 72. The decisions of this Court "have consistently—indeed without exception—allowed sanctions for false statements or perjury; they have done so even

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overheard petitioner's conversation, Kabbaby, not the officers, had invaded petitioner's privacy by making the recording; such an invasion by a private party is not a violation of the Fourth Amendment. The playing of the tape, therefore, if unlawful, violated only Kabbaby's rights. Petitioner consequently is without standing to object to the use of the evidence.

[8] Moreover, petitioner's "retroactivity" argument fundamentally misunderstands the nature of this Court's retroactivity decisions and of the exclusionary rule. The exclusionary rule is a device to deter official misconduct. *Calandra* held that there is no misconduct in asking a grand jury witness questions based upon illegally seized evidence. Because there is no misconduct in this activity, there is no point in applying an exclusionary rule to pre-*Calandra* questions. *United States* v. *Peltier*, 422 U.S. 531, holds that Fourth Amendment decisions should not be applied retroactively so as to *exclude* evidence; plainly, however, it does not establish a rule frustrating the *admission* of probative evidence.

in instances where the perjurer complained that the Government exceeded its constitutional powers in making the inquiry" (*ibid.*; citations omitted).

3. Because "[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim" but "to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures, * * * application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served" (*United States* v. *Calandra, supra*, 414 U.S. at 347-348). The court of appeals therefore properly declined to apply the exclusionary rule to suppress at trial unconstitutionally obtained evidence of perjury, where that evidence was the basis of the questions asked before the grand jury. The only other court of appeals to consider the question has come to the same conclusion. *United States* v. *Raftery*, C.A. 9, No. 75-2021, decided April 12, 1976, petition for a writ of certiorari pending, No. 76-5007. In the absence of a conflict among the circuits, there is no reason for review by this Court.

In our view, the application of an exclusionary rule to evidence necessary to prove perjury before the grand jury would be unlikely to have any deterrent effect upon the conduct of law enforcement officers. The exclusionary rule renders the evidence useless to prove petitioner's commission of the substantive crime. Moreover, petitioner has been granted use immunity pursuant to 18 U.S.C. 6002, so that the seizure, and his testimony, will not yield "fruits" that could be used against him. The evidence was rendered useless in a prosecution of petitioner until he gave it new value by committing perjury. Allowing the evidence to be used to prove that new crime will not induce officers to violate the Fourth Amendment. Even if some officers might anticipate that the object of the search would (1) be called upon to testify under oath and (2) then perjure himself, it is quite unreasonable to

suppose that these officers would be willing to jeopardize a prosecution for the substantive crime on the basis of this ephemeral possibility. See also *United States* v. *Janis*, No. 74-958, decided July 6, 1976, slip op. 20-21.

Assuming *arguendo* that the exclusion of evidence would create a slight deterrent, we submit that the value of that deterrent is far outweighed by the need for truthful testimony during judicial proceedings. As this Court observed in *United States* v. *Mandujano*, *supra*, plurality slip op. 11-12 (footnote omitted):

> Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative. The power of subpoena, broad as it is, and the power of contempt for refusing to answer, drastic as that is—and even the solemnity of the oath—cannot insure truthful answers. Hence, Congress has made the giving of false answers a criminal act punishable by severe penalties; in no other way can criminal conduct be flushed into the open where the law can deal with it.

If it is proper to use illegally seized evidence as a basis for questions before the grand jury, and to hold a witness in contempt if he will not answer, then it must be proper to use that same evidence in a perjury prosecution if the witness affronts the judicial process by answering falsely.

This Court consistently has refused to exclude illegally seized evidence used to call a defendant to account for his perjury. *Walder* v. *United States*, 347 U.S. 62; *Harris* v. *New York*, 401 U.S. 222; *Oregon* v. *Hass*, 420 U.S. 714. Although in each of these cases the evidence was used to impeach a defendant's testimony, this limitation is not crucial where the prosecution is for perjury. In each case the illegally seized evidence was used to deter the commission of perjury and to place before the trier of facts the

true version of events. When the perjury occurs before a grand jury, those interests can be vindicated only by a subsequent prosecution for perjury. As Justice Frankfurter wrote for the *Walder* Court (347 U.S. at 65):

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* [v. *United States*, 232 U.S. 383] doctrine would be a perversion of the Fourth Amendment.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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